STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 20, 2007
v	No. 266586 Macomb Circuit Court
DANIEL ANTHONY WELLS, Defendant-Appellant.	LC No. 2004-004123-FC

Before: Cooper, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of first-degree premeditated murder, MCL 750.316(1)(a), arising from the drowning death of defendant's three-year-old daughter in a laundry tub. We affirm, but the case is remanded for the limited purpose of correcting the judgment of sentence to reflect 444 days of sentence credit.

Defendant argues on appeal that trial counsel was ineffective for failing to investigate and present an insanity defense. Because no *Ginther*[1] hearing was held, this Court's review is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish ineffective assistance of counsel, the burden is on defendant to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and that the deficient performance so prejudiced defendant's defense as to deprive defendant of a fair trial. *People v Pickens*, 446 Mich 298, 318; 521 NW2d 797 (1994).

The record does not support defendant's claims that trial counsel was ineffective because he failed to investigate or present an insanity defense. In order to establish a defense of insanity, a defendant must prove by a preponderance of the evidence that, as the result of mental illness or mental retardation, he lacked "substantial capacity either to appreciate the nature and quality or the wrongfulness of his . . . conduct or to conform his . . . conduct to the requirements of the law. MCL 768.21a(1). The record discloses that defendant was examined by Dr. Richard Rickman, a psychologist with the Center for Forensic Psychiatry. Defense counsel also requested an

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

independent psychological examination and the trial court appointed Dr. Lyle Danuloff, the examiner requested by defendant. Dr. Rickman and Dr. Danuloff both determined that defendant was not mentally ill or mentally retarded at the time he committed the offense.

Defendant argues that he had a viable defense of temporary insanity based on his intoxication due to the consumption of drugs and alcohol. We disagree. Michigan does not recognize a defense of insanity when intoxicants are voluntarily consumed. MCL 768.21a(2). To the extent that involuntary intoxication may support an insanity defense, the evidence did not support such a defense. "Involuntary intoxication is intoxication that is not self-induced and by definition occurs when the defendant does not knowingly ingest an intoxicating substance, or ingests a substance not known to be an intoxicant." *People v Caulley*, 197 Mich App 177, 187; 494 NW2d 853 (1992). Defendant acknowledges that his intoxication was self-induced, but suggests that it could be considered "involuntary" if he was unaware that he was susceptible to an atypical reaction to the substances, or if he was in a stage of alcoholism where he could not resist the substance, or he had a predisposing mental condition that made him drink. Defendant does not cite any Michigan law in support of these theories. More importantly, defendant does not assert that any of these conditions were actually present. Defendant's testimony at trial indicates that he knowingly ingested drugs and alcohol in an attempt to kill himself. Defendant never claimed that he was unaware of the intoxicating effects of the substances he ingested, and we find no evidence in the record to support such a theory.[2]

Because the record discloses that the viability of an insanity defense was investigated before trial, and that there was no evidence to support such a defense, defense counsel was not ineffective for failing to raise the defense at trial. See *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Defendant next argues that the trial court violated his constitutional right to present a defense when it precluded him from presenting expert testimony concerning his state of mind at the time of the offense. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000).

In a pretrial motion, defendant sought to present expert testimony in support of a "defense of protection of individual." Defendant argued that it was his belief at the time of the offense that his daughter was being sexually abused and that the only way he could protect her was to take her life and then kill himself so he could join her in heaven. Defendant clarified that he was not attempting to present an insanity defense, but instead wanted to present expert testimony concerning how a combination of depression, intoxication, and a sense of helplessness regarding his daughter's victimization affected his state of mind at the time of the offense. The trial court determined that defendant was in essence seeking to present a defense of diminished capacity, which was not a viable defense, and accordingly, denied defendant's motion.

[2] We note that in defendant's statement to the police, defendant denied ingesting any substances before he killed his child.

In *People v Carpenter*, 464 Mich 223; 627 NW2d 276 (2001), our Supreme Court abolished the defense of diminished capacity as a viable defense in Michigan. The Court explained:

> The Legislature has enacted a comprehensive statutory scheme setting forth the requirements for and the effects of asserting a defense based on either mental illness or mental retardation. We conclude that, in so doing, the Legislature has signified its intent not to allow evidence of a defendant's lack of mental capacity short of legal insanity to avoid or reduce criminal responsibility by negating specific intent. Rather, the insanity defense as established by the Legislature is the sole standard for determining criminal responsibility as it relates to mental illness or retardation. [*Id*. at 241.]

Although defendant denies that he sought to present a diminished capacity defense, he sought to present expert evidence that he could not form the requisite intent because of his diminished mental state, short of insanity. Pursuant to *Carpenter*, a trial court properly bars a defendant from presenting evidence of his mental state to negate intent. *People v Tierney*, 266 Mich App 687, 713; 703 NW2d 204 (2005). Here, the trial court allowed defendant to present lay evidence that he lacked the requisite intent, and defendant was permitted to testify to that effect. The trial court did not deny defendant his constitutional right to present a defense. It only denied him the right to present evidence of diminished capacity. Because a diminished capacity defense is not recognized in Michigan, the trial court did not abuse its discretion by excluding the evidence.

Finally, defendant argues, and the prosecutor concedes, that defendant is entitled to 444 days of sentence credit for the period defendant was incarcerated between his arraignment and his sentencing. MCL 769.11b. Accordingly, we remand for the limited purpose of correcting defendant's judgment of sentence to reflect an award of 444 days of sentence credit.

Defendant's conviction and sentence is affirmed, but the case is remanded for the limited purpose of correcting the judgment of sentence to reflect 444 days of sentence credit. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter